ANTHONYSAMY v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) June 18, 1956]
[K. L. — Criminal Appeal No. 25 of 1956]

Penal Code s. 304A — Causing death by rash or negligent act — Meaning of "negligence" and "rashness" — Whether a high degree of negligence is required.

In this case the appellant was convicted under s. 304A of the Penal Code on a charge of causing the death of one Lim Teck Chor by doing a rash act not amounting to culpable homicide, namely by driving a motor lorry at an excessive speed and close to the right hand side of the road. In his grounds of judgment the learned President referred to the Singapore case of **Woo Sing & Anor. v. R.**[1] and said: "From this it appears that an offence under section 304A does not require the high degree of negligence in other words criminal negligence that is required for manslaughter. In view of this I had no hesitation in finding the accused guilty of the offence." On appeal it was submitted that: (i) the F.M.S. cases of **Public Prosecutor v. Bachita Singh & Ors.**[3] and **Cheow Keok v. Public Prosecutor**[2] were binding on the Court and that these cases clearly lay down that a high degree of negligence must be proved before a person could properly be convicted of an offence under section 304A of the Penal Code; (ii) the learned President in this case had been satisfied with a lower degree of negligence which under the F.M.S. decisions could not be sufficient to support a conviction; (iii) if the appellant was negligent at all there might be a case for a conviction for negligent driving under section 4(2) of the Motor Vehicles (Driving Offences) Proclamation.

Held: (1) the F.M.S. decisions referred to were binding on the Court but the decision in **Woo Sing & Anor. v. R.**[1] was the correct interpretation of section 304A of the Penal Code; (2) the learned President had not made a specific finding with regard to the degree of negligence but there was in this case that high degree of negligence required to justify a conviction under section 304A in accordance with the law as laid down in the F.M.S. decisions; (3) if in criminal matters a further degree of negligence was required to be proved, the further degree should be the same in all offences and the gravity of the offence depended on the consequences covered by the negligent act for which different penalties were provided by law.

Cases referred to:—

(1) *Woo Sing & Anor. v. R.* (1954) M.L.J. 200.
(2) *Cheow Keok v. Public Prosecutor* (1940) M.L.J. 103.
(3) *Public Prosecutor v. Bachita Singh & Ors.* (1940) M.L.J. 187.
(4) *Lai Tin v. Public Prosecutor* (1939) M.L.J. 248.
(5) *Tara Singh v. Public Prosecutor* (1954) M.L.J. 123.
(6) *Nidarmati Nagabhushanam* (1872), 7 Mad. H.C. Rep. 119.
(7) *R. v. Idu Beg* I.L.R. 3 All. 776.
(8) *Andrews v. Director of Public Prosecutions* (1937) A.C. 576; (1937) 2 All E.R. 552; 26 Cr. App. R. 34.

MAGISTRATE'S CRIMINAL APPEAL.

R. G. Ritchie for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Buhagiar J. : — The appellant was charged with causing the death of one Lim Teck Chor by doing a rash act not amounting to culpable homicide, namely by driving a motor lorry at an excessive speed and close to the right hand side of the road and that thereby he committed an offence punishable under section 304A of the Penal Code.

The learned President found the appellant guilty and convicted him. In his grounds of judgment the learned President said :—

> "The law with regard to offences under section 304A has been considered by a full Court of three judges in the Singapore case of **Woo Sing and Sim Ah Kow v. Regina**[1]. In that case Murray-Aynsley C.J. stated: 'Different degrees of gravity can be treated by a suitable variation in the penalty bearing in mind that section 304A involves offences of much less gravity than such as would come within the scope of manslaughter in England'.
> From this it appears that an offence under section 304A does not require the high degree of negligence in other words criminal negligence that is required for manslaughter. In view of this I had no hesitation in finding the accused guilty of the offence."

The appellant appealed against conviction on the following grounds :—

(a) that the learned President erred in law in holding that the decision in the Singapore case of **Woo Sing & Another v. Regina** is a correct statement of the law relating to offences under section 304A of the Penal Code in the Federation in so far as that case decides that the degree of negligence required for a conviction under that section is lower than the high degree of negligence required to support a conviction in England on an indictment for manslaughter by negligence and that the learned President erred in law in failing to follow the case of **Cheow Keok v. Public Prosecutor**[2] as regards the degree of negligence, which was required to be proved against the accused; and
(b) had the learned President correctly directed himself in law, it is clear that he would have found that the degree of negligence required by law to prove the charge against the appellant had not been proved and would accordingly have acquitted the appellant.

Counsel for the appellant referred to the two F.M.S. cases of *Public Prosecutor v. Bachita Singh & Ors.*[3] and *Cheow Keok v. Public Prosecutor*[2], the latter case overruling *Lai Tin v. Public Prosecutor*[4]. He submitted that these cases clearly lay down that the same high degree of negligence must be proved before a person could properly be convicted of an offence against section 304A of the Penal Code as would be required to be proved to sustain a conviction for manslaughter by negligence in England and that English authorities should be followed; that these cases were binding on the Court below and on this Court while the Singapore case of *Woo Sing v. Regina*[1], was not. As to the finding of negligence Counsel for the appellant submitted that it is clear from the grounds of decision that the learned President was satisfied with a lower degree of negligence which under the F.M.S. decisions would not be sufficient to support a conviction. Counsel finally submitted that if the appellant was negligent at all there might be a case for a conviction for negligent driving under section

4(2) of the Motor Vehicles (Driving Offences) Proclamation (B.M.A. No. 42).

With regard to the first submission of the learned Counsel I held that the F.M.S. decisions referred to were binding on this Court but that in my view the decision in *Woo Sing v. Regina*[1] was the correct interpretation of section 304A. With regard to the third submission, that is, a conviction for negligent driving I expressed the view that if in criminal matters a particular degree of negligence was required to be proved, the particular degree should be the same in all offences and that the gravity of the offence depended on the consequences caused by the negligent act for which different penalties were provided by law; I could see no justification for distinguishing between the degree of negligence for a conviction under section 304A and for a conviction for negligent driving. With regard to the degree of negligence in this particular case I found that the learned President did not make a specific finding but in my view there was that high degree of negligence to justify a conviction under section 304A of the Penal Code in accordance with the law as laid down in the F.M.S. decisions referred to above. I therefore dismissed the appeal.

In view of the frequent cases before the Courts on charges under section 304A and of the submissions made and of a certain amount of confusion that exists as regards the degree of negligence required for a conviction under that section and for a conviction under the provisions of the Motor Vehicles (Driving Offences) Proclamation dealing with dangerous, negligence and inconsiderate driving, it may be convenient if I give at some length the reasons for agreeing with the decisions in *Woo Sing's* case.

In the first place it is, in my opinion fallacious to compare the offence under section 304A of the Penal Code to manslaughter in English law. As Murray-Aynsley C.J., (with whom Pretheroe, Ag. C.J. (F.M.) agreed) pointed out in *Woo Sing's* case, the Penal Code is not a codification of English law, where the law as to homicide remains unwritten and is still in a confused state and where there still remains, in theory at least, constructive murder and constructive manslaughter; in the circumstances the English law of manslaughter has no relevance in the interpretation of section 304A. There are substantial differences between the law of murder and manslaughter in England and the law of culpable homicide under the Indian Penal Code; these differences are dealt with by *S. G. Vesey-Fitzgerald* in an article "The Reform of the Law of Murder" published in Vol. 2 of Current Legal Problems 1949. After dealing with the doctrine of constructive manslaughter, the author goes on to say :—

"Having disposed of the fictitious element in crimes of homicide, it may be well to explain the attitude of Indian law to illegal omissions and to contrast it with the English law. In English law a man is guilty at any rate of manslaughter if his omission to perform a legal duty amounts to gross negligence — a somewhat vague term of which the nearest approach to a definition is that given by Lord Atkin in **Andrews v. Director of Public Prosecutions**, above cited. Deliberate intent and gross negligence are lumped together. In India illegal omissions are equated with acts. If, a nurse, being bound to feed a helpless invalid deliberately withholds food, knowing that the result will probably be death, that is murder. If she knows only that death is likely, then it is culpable homicide. If she is merely negligent or rash,than it is 'causing death by a rash or negligent act'. The Indian law, in fact, both for acts and illegal omissions, has a triple set-up as opposed to the dual set-up of the English law. Whether this is desirable depends on whether it is desirable to draw fine distinctions in dealing with questions of the mental element in crime, and we submit that it is desirable in order that punishment may be made more accurately assessed."

That the offence under section 304A is something completely outside the scope of culpable homicide is clear from the express words in the section itself — "doing a rash or negligent act *not amounting to culpable homicide*"; in culpable homicide the *mens rea* consist in the intention of or the knowledge specified in section 299. For an offence under section 304A such intention or knowledge is not necessary; the elements of the offence under that section are (a) a negligent or rash act, and (b) death caused by such act.

"Negligence" and "rashness" are nowhere defined in the Code, but as I had the opportunity of pointing out in *Tara Singh v. Public Prosecutor*[5] there are two definitions of these terms which are universally accepted as classic : by Holloway J. in *Nidamarti's*[6] Case and by Straight J. in *Idu Beg's*[7] Case. Adopting these definitions and bearing in mind that "intention" or "knowledge" referred to in section 229 are not elements in offences under section 304A, the crucial question is to determine the mental element in offences under the latter section. I will not attempt to try to solve the problem; where the House of Lords (in *Andrews v. Director of Public Prosecutions*[8]) has so carefully forborne to tread, it would be extremely rash to attempt an explanation; for although Lord Atkin's speech in that case does establish that if death is caused in the course of doing an unlawful act, *viz.*, driving a car in such manner that (if death had not occurred) a conviction would have been obtained for an offence under section 11 of the Road Traffic Act, 1930, the accused is not necessarily guilty of manslaughter, it is still very difficult to distinguish between the mental attitude required for manslaughter and for offences under section 11. That case failed to state affirmatively what exactly is the *mens rea* in manslaughter and oscillated between the adoption of an objective and a subjective test of liability in discussing whether or not a death caused by 'dangerous' driving must or could be manslaughter; the word 'negligence' was at one time used to indicate the offender's conduct and at another

to indicate his attitude of mind. I, venture to suggest, however, that the test to be adopted in determining whether an act is rash or negligent for the purposes of section 304A is the objective test rather than the subjective one. That there are various degrees of negligence or rashness there can be no question but such degrees can be determined only if the objective test is adopted; at least in the case of negligence, there cannot, it is submitted, be various degrees if the subjective test is adopted, because negligence is blameworthy inadvertence and as pointed out in the latest edition (1952) of *Kenny,* Outlines of Criminal Law, at p. 30, "nor indeed can there be degrees of inadvertence when that word is used to denote a state of mind, since it means that in the man's mind there has been complete absence of a particular thought, a nullity; and of nullity there can be no degrees." The test, therefore, for determining negligence and rashness is whether a reasonable man in the same circumstances would have realized the prospect of harm and would have stopped or changed his course so as to avoid it: the test is the same in tort and "criminal intention" or "wicked mind" are immaterial.

As pointed out in *Gour's* Penal Law of India (6th, 1955 ed.) Vol. 2 at p. 1390, section 304A applies to all acts, which are not criminal in themselves, but are punishable by reason of death being caused, and belongs to the class of offences, which, when not causing death, are also otherwise punishable as public nuisances, (sections 278—289).

The word "negligence" must be given the same meaning consistently throughout the Penal Code. Now, on examination of the various sections where this word appears, e.g., sections 336, 268, 279, 282 it is apparent that that word cannot have the meaning of "gross negligence" "high degree of negligence" that is necessary in England for a conviction on an indictment for manslaughter. For the purposes of these sections no higher degree of negligence is required than that in civil matters. The gravity of these offences, for which the law provides different degrees of punishment, depends on the consequences or possible consequences of the negligent or rash act.

In my opinion the high degree of negligence required in English law for the felony of manslaughter is more akin to the *mens rea* in section 299 of the Penal Code for offences of culpable homicide not amounting to murder that is "knowledge that he is likely by such act to cause death". In most cases where death has been caused by such a high degree of negligence it will be possible to infer that the offender acted with such knowledge. Thus, if a person drives a motor car at a high speed in a crowded street, it is, I think, possible to infer that he acted with such knowledge and if death results the proper charge would be one of culpable homicide not amounting to murder; and if death does not result or only hurt is caused then the offender could be charged under section 308. Whether such knowledge can be inferred or not is naturally a question which depends on the circumstances of each case; thus, in the case of a cyclist who rides a bicycle in similar circumstances in a crowded street such knowledge would not be inferred and if death results it would be a case of an offence under section 304A.

Support of the view that the negligence necessary for the purposes of section 304A is the same as in civil matters may be found in two sections of the Code which do not seem to have been considered in any reported case where the said section was considered; I refer to sections 32 and 43. Section 32 provides: "In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omission"; and section 43 lays down: "the word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action . . .". In view of these provisions if a doctor causes the death of a person by omitting to do something which the proper skill of his profession required him to do and that omission was such as to furnish ground for a civil action, then the inference is irresistible that there is negligence within the meaning of section 304A.

To summarize the opinions expressed above:—

(a) the offence under section 304A of the Penal Code does not correspond to the felony of manslaughter in English law, and therefore English cases on the *mens rea* and the degree of negligence necessary for manslaughter are not applicable in the interpretation of that section;

(2) negligence for the purposes of section 304A and of other sections in the Code where negligence is an ingredient of the offence is the same as in civil matters; and

(3) the standard of negligence in an offence under section 4(2) of the Motor Vehicles (Driving Offences) Proclamation is the same as under the Penal Code.

Appeal dismissed.